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No. 82-197

In The

Supreme Court of the United States

October Term, 1981

JOSEPH A. MARESSA,

Petitioner,

vs.

NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,

Respondents.

On Writ of Certiorari to the New Jersey Supreme Court

BRIEF AMICUS CURIAE

SEIFFERT, FRISCH, McGIMPSEY
AND CAFFERTY, P.C.
Attorneys for Amicus Curiae
New Jersey Press Association
1445 U. S. Route 130
North Brunswick, New Jersey 08902
(201) 297-8300

THOMAS J. CAFFERTY
ALEXANDER F. McGIMPSEY, JR.
On the Brief

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LUTZ APPELLATE PRINTERS, INC.
NY (212) 563-2121 • (516) 222-1686 • (914) 683-9583
NJ (201) 297-4830 • PA (215) 563-5587 • DC (703) 783-7288 • MA (617) 542-1114

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BRIEF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The New Jersey Press Association (hereinafter "NJPA") is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. The NJPA membership includes twenty-two (22) daily newspapers, ninety-nine (99) weekly newspapers, and one hundred forty-one (141) corporate and individual associates.

The case presented purports to draw into issue the constitutionality of the New Jersey Shield Law. N.J. Stat. Ann. §2A:84A-21. This law is of vital concern to the news media as it was promulgated to protect, within federal and state constitutional limits, the sources and information obtained by a reporter pursuing his professional activities. The NJPA is composed of the substantial majority of the weekly and daily official newspapers throughout the State. Hence, any determinations made concerning the constitutionality of the Shield Law will have a direct effect upon the NJPA and its constituents.

The NJPA has participated as an amicus in this matter before the New Jersey Supreme Court.

SUMMARY OF ARGUMENT

This Court has held that States have the sole right to fashion their own Shield Laws absent a countervailing federal right. There are no such countervailing rights in this instance. Therefore, a review of New Jersey's Shield Law is neither warranted nor appropriate.

ARGUMENT

I.

The New Jersey Legislature should not be interrupted in its process of suiting its Shield Law to the State's specific needs.

This Court permits state legislatures to effect laws according to their state interests, *Branzburg v. Hayes*, 408 U.S. 665 (1972). While holding that the First Amendment to the United States Constitution did not provide an evidentiary privilege for the press with respect to a Grand Jury investigation of criminal conduct, Justice White nevertheless went on to state:

> "*There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards* in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas." 408 U.S. at 706 (emphasis added).

Thus, this Court has recognized the importance of state legislative involvement in suiting a solution to press testimonial privileges.

The New Jersey State Legislature has assumed the responsibility of fashioning an appropriate press testimonial privilege. New Jersey's current Shield Law, N.J. Stat. Ann. §2A:84A-21 (West Supp. 1982-83), has evolved through a series of state legislative enactments. In particular, the Legislature reviewed and revised the law as late as 1979 in response to court interpretations. *In re Bridge*, 120 N.J. Super. 460, 295 A. 2d 3 (1972), *cert. den.* 410 U.S. 991 (1973); *In re Farber*, 78 N.J. 259, 394 A. 2d 330 (1978), *cert. den.* 439 U.S. 907 (1980). The resulting amendments refined the law to properly balance the needs of a free and robust press against the competing interest of an individual

in learning the source of that press' information within the dictated parameters of the New Jersey Supreme Court decisions as well as this Court's decisions.

In keeping with the court's pronounced desire to permit the States to develop their own Shield Law statutes, this Court should not interrupt the reasoned process of the New Jersey State Legislature to meet the needs of New Jersey.

II.

Where no federal rights are abridged the States are free to fashion their own Shield Laws consistent with their own Constitutions and interests.

This Court stated in *Branzburg v. Hayes,* 408 U.S. at 706:

> "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."

Citing this passage, Justice Pashman, writing for the New Jersey Supreme Court, affirmed the constitutionality of New Jersey's Shield Law, holding that where there are no countervailing federal or state constitutional rights, newspersons have an absolute evidentiary privilege. *Maressa v. New Jersey Monthly,* 89 N.J. 176, 189 (1982).

This case does not present an issue of infringement of any federal or state constitutional rights. This Court established in *Paul v. Davis,* 424 U.S. 693, 712 (1967) that there is no federal constitutional right to sue for damages to reputation alone.

Nor does this case present a federal question of denial of equal protection in conflict with the Fourteenth Amendment to the United States Constitution. In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court explained:

> "The Equal Protection clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle." 440 U.S. at 588.

Hence, even though evenhanded application may result in an uneven effect among certain groups, there is no violation. *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). "[T]he Fourteenth Amendment guarantees equal laws, not equal results." *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. at 273. The New Jersey Shield Law is an evidentiary privilege which applies equally to all persons similarly situated. All libel plaintiffs, *public and private*, are subject to the absolute testimonial privilege afforded under the statute. *Maressa v. New Jersey Monthly*, 89 N.J. at 194. Any unequal impact among libel plaintiffs is the result of differing proof burdens placed upon public versus private plaintiffs through the application of First Amendment principles rather than the New Jersey Shield Law.

Finally, the New Jersey Supreme Court has conclusively ruled that its Constitution does not create a right to maintain an action for libel. *Maressa v. New Jersey Monthly*, 89 N.J. at 192. Accordingly, there are no state constitutional rights abridged by this Shield Law.

Petitioner's argument that the Shield Law works difficulties upon him in his garnering of proof should not be confused with

the establishment of a constitutional deprivation. There simply is no basis in fact or law for such a proposition;[1] hence his petition should be denied.

CONCLUSION

New Jersey, through its Legislature and courts, has defined press testimonial privileges within the parameters granted it by the federal and its own Constitutions. It would be improvident for this Court to grant review on this petition for certiorari as no federal constitutional rights have been infringed upon.

Respectfully submitted,

THOMAS J. CAFFERTY
ALEXANDER F. McGIMPSEY, JR.
SEIFFERT, FRISCH,
McGIMPSEY & CAFFERTY
Attorneys for Amicus Curiae
New Jersey Press Association
1445 U.S. Route 130
North Brunswick, New Jersey 08902

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1. The Shield Law is a Rule of Evidence which does not bar suit, but rather precludes compelled disclosure from newspersons of the information within the ambit of the statute. Petitioner has speculated as to a prospective inability to prove his case because of this evidentiary privilege. However, as Justice Pashman noted below (89 N.J. 199-200) other avenues of discovery are available to petitioner.

At this juncture (pre-trial discovery), petitioner has not availed himself of these alternatives, and, as such, his petition would appear to be premature.